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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Cable Television Consumer Protection And Competition Act of 1992

Broadcast Signal Carriage Issues

MM DOCKET NO. 92-259

COMMENTS OF
BLACK ENTERTAINMENT TELEVISION, INC.

Black Entertainment Television, Inc. ("BET") hereby submits these Comments on the FCC's Notice of Proposed Rulemaking ("NPRM") concerning the adoption of new "must carry" and "retransmission consent" rules required by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act").

INTRODUCTION

BET is the first and only satellite-delivered U.S. cable television network with programming focused on the interests, lifestyles and cultural contributions of African Americans. Launched in 1980 as a part-time service which aired on Friday nights between 11:00 p.m. and 1:00 a.m., today BET

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provides programming 24 hours per day, seven days a week to approximately 34.2 million U.S. households. ^{1/}

Adversely affected by the two previous must carry regimes, BET has participated as an intervenor in the court challenges to the rules which were struck down by the D.C. Circuit in the Quincy ^{2/} and Century ^{3/} cases. Moreover, BET currently is a party in one of several court challenges to the new must carry rules which were adopted by Congress in the 1992 Cable Act.^{4/} BET believes that the new must carry provisions, like the two previous versions, are fundamentally anticompetitive and are an unconstitutional infringement on the First Amendment and Equal Protection guarantees of non-broadcast cable programmers.

In view of BET's court challenge to the new must carry rules, our involvement in the NPRM proceeding is limited. However, BET would like to address several issues in the NPRM to give the Commission the opportunity to consider the effect of any must carry rules on the rights of cable programmers in general, and minority cable programmers like BET in particular. BET urges

^{1/} Number of subscribers to BET based on Nielsen Media Research estimates as of December, 1992.

^{2/} Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985) (per curiam), cert. denied 476 U.S. 1169 (1986).

^{3/} Century Communications Corp. v. F.C.C., 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (1988), cert. denied, 486 U.S. 1032.

^{4/} Turner Broadcasting Sys., Inc. v. F.C.C., Civil Action No. 92-2247 (D.D.C. filed October 5, 1992).

the Commission to craft rules which: 1) preserve the diversity of viewpoints mandate of the Communications Act, and 2) minimize disruption of cable service and respect the contractual relationships between cable operators and cable programmers.

I. The Commission Should Craft Must Carry Provisions Consistent With Principles of Diversity.

Recognizing its mandate to regulate "communications by wire and radio so as to make available...to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service...",^{5/} the FCC has adopted a number of policies designed to increase diversity in viewpoints provided over broadcast television ^{6/} and cable television. ^{7/}

Moreover, one of the expressed findings of the 1992 Cable Act is that

'[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.' 1992 Act, Section 2(a)(6).

And Section 2(b)(1) states that it is the policy of the Congress in the 1992 Act to

'promote the availability to the public of a diversity of views and information

^{5/} 47 U.S.C. § 151.

^{6/} See e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978).

^{7/} See e.g., Policy Statement on Minority Ownership of Cable Television Facilities, F.C.C. 82-524, released December 22, 1982.

through cable television and other video distribution media...'.

But by reenacting the must carry rules, Congress in fact inhibits diversity by requiring cable operators to set aside as much as one-third of their activated channel capacity for carriage of largely non-minority broadcast licensees who provide substantially similar program packages. For example, of the nearly 1500 commercial television stations currently on the air, approximately 40 are minority-owned, and of these, a mere 23 are black-owned.^{8/} This means that must carry rules, in effect, give an outright preference to broadcast licensees, the overwhelming majority of which are owned by and programmed for non-minorities. Viewed this way, must carry rules in any form are at odds with minority ownership/diversity goals because they negatively impact the emergence of diverse cable programming services. They also artificially limit the number of channels available for non-broadcast programmers, in general, and minority programmers in particular.

For these reasons, BET encourages the Commision to adopt rules and construe the must carrry provisions of the 1992 Act in a manner that gives cable operators the greatest editorial discretion to package programming. One provision of the 1992 Act that lends itself to such a diversity oriented approach is §615(e) concerning "substantial duplication" of television signals.

8/ See, "Compilation by State of Minority Owned Commercial Broadcast Stations, 1991-92," National Telecommunications and Information Administration, Minority Telecommunications Development Program.

The 1992 Act states that a station need not be carried if it "substantially duplicates" the signal of another must carry station. See 47 U.S.C. §615(e). This exception reflects congressional acknowledgment that mandatory carriage of "substantially duplicating" stations is of little value. In recognition of this, BET submits that "substantially duplicating" should be defined as duplication of 50% or more of a station's average weekly programming or 50% or more of its primetime programming (inasmuch as primetime programming accounts for the majority of television viewing). Moreover, this 50% threshold should be enforced regardless as to whether the duplicated programming is aired simultaneously.

II. The Must Carry Rules Should Minimize Disruption of Cable Service and Respect Contractual Relationships Between Cable Operators and Cable Programmers

The 1992 must carry rules do not address the manner in which other (non-must carry) program services should be moved or deleted to accommodate must carry obligations. For example, the statute does not address whether the cable operator can void its contract with a cable programmer such as BET in order to fulfill its statutory obligation to carry a must carry station; it does not address whether the operator must add must carry stations immediately upon the effective date of the rulemaking proceeding or whether it can make channel line-up changes at the next scheduled adjustment in channel line-up; and it does not address how

the operator should go about rearranging channel line-ups to satisfy must carry obligations.

BET suggests that the Commission allow cable operators to develop their own implementation plan and schedule for must carry and retransmission consent stations to minimize the transition burden on all parties, including cable subscribers and non-must carry cable programmers. Alternatively, the Commission could adopt a coordinated schedule of dates on which any necessary channel carriage changes will be made. This will enable all parties to plan for the changes and give appropriate notice to subscribers and franchising authorities.

BET finally submits that cable operators which would be required to delete particular cable services to satisfy a must carry obligation should be entitled to wait until the expiration of a carriage agreement before it deletes a cable programmer.

CONCLUSION

For the reasons discussed above, BET suggests that the Commission consider the effect that the must carry rules have on its diversity of programming goals, and that it adopt a fair and flexible approach in crafting the rules so as to minimize the

disruption to cable television services and affiliation agreements with non-must carry programmers such as BET.

Respectfully submitted,

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January 4, 1993